**STATE OF CALIFORNIA**

**AGRICULTURAL LABOR RELATIONS BOARD**

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| *In the Matter of:*<br><br>TULE RIVER DAIRY and P&M VANDERPOEL DAIRY,<br><br>*Respondent,*<br>*and*<br><br>UNITED FOOD & COMMERCIAL WORKERS, LOCAL 5,<br><br>*Charging Party.* | **Case Nos. 05-CE-49-VI and 05-CE-51-VI** |

***Appearances:***

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**DECISION OF ADMINISTRATIVE LAW JUDGE**

JAMES WOLPMAN: I heard this unfair labor practice case at Visalia, California on December 2 and 3, 2008.

## I. PROCEDURAL HISTORY

On October 11, 2005, the United Food and Commercial Workers, Local 1096 filed unfair labor practice charge No. 05-CE-49-VI with the Visalia Office of the Agricultural Labor Relations Board (ALRB or Board), against Tule River Dairy and P&M Vanderpoel Dairy, alleging that it discharged Miguel Lopez on October 6, 2005 for union activity protected by the Agricultural Labor Relations Act (ALRA). (Board Exhibit 1-A.)

On October 18, 2005, the United Food and Commercial Workers, Local 1096 filed unfair labor practice charge No. 05-CE-51-VI with the Visalia Office of the Agricultural Labor Relations Board (ALRB or Board), against Tule River Dairy, alleging that it unlawfully denied representatives of Local 1096 access to its employees as required by the Agricultural Labor Relations Act (ALRA). (Board Exhibit 1-B.)

On November 27, 2007, the Regional Director of the Visalia Office issued a Complaint alleging that Tule River Dairy and P&M Vanderpoel Dairy, violated Sections 1153(a) and 1153(c) of the Act by discharging Miguel Lopez on October 6, 2005 and by denying representatives of the United Food and Commerical Workers access to the employees of Tule River Dairy on October 14, 200. (Exhibit 1-C.) On April 3, 2007, Tule River Dairy and P&M Vanderpoel Dairy Farms filed its Response

denying the alleged violations and raising a number of affirmative defenses. (Exhibit 1-D.)

## II. JURISDICTION

The Parties admitted or stipulated:

a. That the charges were served and filed within six months of the alleged unfair labor practices.

b. That the respondents are agricultural employers and operate as joint employers under the Act.

c. That the United Food and Commerical Workers, Local 1096, now Local 5, was a statutory labor organization.

d. That Miguel Lopez was an agricultural employee

e. That Mike Vanderpoel, Tina Leal, Howard Sagaser, and Ricardo Vasquez were supervisors and/or agents of Respondents.

f. That Miguel Lopez was terminated by Tule River Dairy on October 6, 2005.

## III. FINDINGS OF FACT

### *A. Background*

At the time in question—October 2005—Tule River Diary was managed by Mike Vanderpoel and owned by his father, Pete Vanderpoel, Sr. Mike also manages and owns 60% of the P&M Vanderpoel Dairy, while Pete, Sr. owns the remaining 40%. The two dairies are just over a quarter of a mile apart in the town of Tipton in Tulare County.

Tule River Dairy—the focus of the alleged unfair labor practice allegations—is a 160-acre dairy that milks, feeds and breeds about 1500 cows. It operates night and

day, year around. At the time, it had 12 employees: milkers who work inside the barn and pushers, feeders and breeders who primarily work outside. Each group worked two shifts, but inside employees had different starting and quitting times than those working outside. All were under the immediate supervision of foreman Ricardo Vasquez Hernandez ("Vasquez"), who lived on the premises in a house 200 feet or so from the Milk Barn. Mike Vanderpoel spends about 80% of his time at Tule River Dairy and 20% at P&M Vanderpoel Dairy.

***B. Denial of Access.***

On the morning of October 11, 2005, just before filing the Petition for Certification, union organizers, Juan Cervantes and Efrain Aguilera, went to the Tule Dairy, where they met Mike Vanderpoel. They identified themselves, and Aguilera served him with copies of the Petition, the Notice of Intent to Take Access, and the Notice to Organize, as well as a copy of the unfair labor practice charge alleging the discriminatory discharge of Miguel Lopez. Vanderpoel accepted the papers without comment, and the organizers left to file their documents at the ALRB office in Visalia

After doing so, they returned to the Dairy about 11:00 a.m., where they again spoke with Vanderpoel, and explained his obligation under the Board's Regulations to provide them with the shift schedules needed to take appropriate access—a hour before work, an hour after, and an hour during lunch.

Initially, he refused to provide the information and, when Cervantes used his cell phone to contact an ALRB representative so she could explain his obligation, declined to speak with her. However, a few minutes later he used his own phone to

call the ALRB. After talking with the representative, he told Aguilera and Cervantes that "workers start…at 5:00 in the morning [and] that they start taking their lunch break one by one…from 11:30 to 1:30, and they…finish by 5:30 p.m." (R.T. 126.)

In his testimony, Mike Vanderpoel recalls being asked for the work schedules, but has no clear recollection of having the time frames called for in the Access Regulation explained to him, either by the union organizers or by the ALRB representative with whom he spoke. (R.T. 237.)

Following their conversation with Vanderpoel, the two organizers took access for two hours, from 11:30 a.m. to 1:30 p.m., just outside the room in the Milk Barn where workers went to warm their food on a microwave. During that 2-hour period, no one from management told them to leave.

The following day, October 12th, when they returned to the same location at 11:30 a.m., foreman Vasquez told them he had been instructed to allow them into the garage where the workers ate their lunches. For his part, Vanderpoel testified that he gave no such instructions. (R.T. 266.) In any event, they waited there a full two hours but no workers showed up, and no one from management told them to leave.

The next day they returned to the garage and again stayed the full two hours, from 11:30 a.m. to 1:30 p.m. They met with no workers that day and, at one point, asked the foreman, who had been passing back and forth as they waited, "What time are the workers supposed to take their lunch?" He said, "I don't know, it's up to

them…I'm not a babysitter…." (R.T. 130-131.) Again, no one objected to their staying the second hour.[1]

The following day, October 14th, was a different story. When Cervantes and Aguilera arrived at 11:30a.m., a barbecue was in progress in the garage area. Workers from both Tule and P&M Dairy were present, as were Foreman Vasquez, Mike and Pete Vanderpoel, and Labor Consultant Tina Leal. The exact location of the management personnel during barbecue is disputed. Cervantes and Aguilera place them in the garage area itself, while Mike Vanderpoel has them on the other side of a 6-foot wall separating the garage from the shop area. (R.T. 158, 244.) But all agree that at 12:30 p.m.—after an hour had elapsed—Mike approached the organizers and said, "Your time is up, you've got to leave." (R.T. 133.) When they refused, claiming the right to stay an additional hour, Aguilera testified that he angrily told them, "Like I said, your time is up, and you've got to get the hell out of here." (R.T. 133.) In his testimony, Mike Vanderpoel acknowledges being insistent but not angry or profane. (R.T. 246-247.) He left, but returned shortly with Ms. Leal and repeated his demand that they leave. When they again refused, Leal offered her cell phone, saying, "I've got [our attorney] Howard [Sagaser] on the line, you want to talk with him?" (T.R. 135.) Cervantes declined, Leal and Vanderpoel walked away, and the two organizers stayed on until 1:30 p.m.

[1] From the 12th on, the organizers took access for up to an hour before and after work on various days. That access was not objected to, and the General Counsel makes no claim of access violations relating to those visits.

When they returned to their office, they were shown a letter that Sagaser had faxed to Union President Pete Maturino asserting that, under the Board's Access Regulation (Cal. Code Regs., tit. 8, §20900), they were limited to lunchtime access of one hour and claiming that the additional hour they had taken constituted a trespass. (Respondent Exhibit #4.) The letter went on to spell out the exact periods of lunchtime access and access before and after work that would be permitted.

Thereafter, the union confined itself to lunchtime access of one-hour, and, on October 18th, filed an unfair labor practice charge alleging that Tule had violated an implied agreement, sanctioned by §20900(e)(2), to permit access of two hours during lunch.

***C. The Discharge of Miguel Lopez***

Miguel Lopez was originally hired by Foreman Ricardo Vasquez as a milker in July, 2004. He worked until June 2005, when he left to care for a sick relative. During that period, there were no problems with his work; in fact, on two or three occasions Vasquez complimented him.

When he returned to the area in August 2005, Vasquez rehired him to work as a pusher.[2] Shortly after he began work, Vasquez told him that Mike Vanderpoel had been watching him on the video camera, liked what he saw, and wanted him promoted to milker, with an increase in pay. (R.T. 80.) For his part, Vanderpoel's denies any

[2] A pusher is responsible for bringing the cows to the milking barn from the corral, "pushing" the food, and checking cows out from the hospital.

role in Lopez' rehire or promotion. (R.T. 252-253.) From August until October, when he was fired, there were no complaints about his work.

Lopez' fellow milker, Mendoza, testified that three or four days before the firing, he, Lopez and another milker discussed the union while at work. (R.T. 55-56.) Then, on the evening of October 5th, the day before he was terminated, Lopez and two other employees attended a union meeting at a friend's home in Tulare. Union organizers Aguilera and Cervantes explained the benefits of unionization and provided him with authorization cards. After the meeting, at about 8:00 p.m., he returned to the dairy where he spoke about the union to the night-shift milkers and offered them authorization cards to sign. During the hour he spent there, he made no effort to conceal his behavior even though he was aware of two video cameras in the barn and the barn's the proximity to the foreman's residence. (R.T. 99.)[3] While there, he saw neither Vasquez nor Vanderpoel. (R.T. 97.)

The next morning he arrived for his shift at 7:00 a.m. During the course of the day he had conversations about the benefits of unionization with 5 or 6 employees, and asked them "to sign cards so that we could have better work conditions." (R.T. 86.) Most of those conversations took place in the milking barn and that, while there, he handed out cards in the barn to 3 employees. He testified that, in doing so, he again made no attempt to conceal his behavior from the cameras. (R.T. 99.) One of

[3] Mendoza, on the other hand, testified that Lopez attempted to conceal his union activities. (R.T. 72-73.)

the employees he spoke to was the brother-in-law of the foreman and lived with him the premises. (R.T. 87-88.)

At the end of his shift, about 6:30 p.m., Foreman Vasquez approached him, "and he said he was sorry, but that the boss [Mike Vanderpoel] had ordered him to fire me." (R.T. 89.) When he asked why, Vasquez said, "[He] was doing what the boss would tell him to do, that the boss told him to fire me, and that he was doing that, firing me." (R.T. 89.) Osvaldo Mendoza,[4] who was standing few feet away, testified that Vasquez said, "That the boss was firing [Lopez], that he did not know why, but that he was firing him," and "that if he did not fire him, that he himself was going to get fired." (R.T. 41.) Mendoza himself then asked the foreman "why was he being fired, because he was a good worker," and was told, "That it was an order that he had just gotten from the boss, and that he was unable to do anything about it." (T.R. 41-42.)

Mendoza testified that, at the time, there was only one video camera (R.T. 55, 69) and that he believed Lopez had attempted to avoid being observed as he spoke about the union and distributed authorization cards. (R.T. 72, 73.) Mendoza did not see Vanderpoel in the milk barn that day (R.T. 63), but he did see Vasquez in the vicinity while Lopez was passing out cards to workers arriving for the next shift. (R.T. 71-72.)

[4] The parties stipulated that Mendoza, as "shift leader/head milker" was not a supervisor

The existence of only one camera was confirmed by Mike Vanderpoel, who explained that it recorded in black-and-white, without sound, and was located in the breezeway of the barn, and viewable in his office. He used it "to watch for any problems." (R.T. 234.) It would record for 6 hours, then automatically stop, rewind, and record over the existing footage. He testified that only once from August to October 2005 had he bothered to watch it and that he had no idea how frequently his foreman did so. He specifically denied having seen Lopez passing out cards or having any knowledge, prior to October 11th, that a union organizational drive was underway. He further testified that Foreman Vasquez spent no more than two hours a day in the barn with the day and night shift milkers.

He asserted that Lopez was fired, not for activity on behalf of the union, of which he had no knowledge, but because he personally observed him ignoring proper sanitation procedure by "not post-dipping cows, not wiping cows clean and sanitary like they should be." (R.T. 232.)

He explained the sanitation procedures to be followed during milking. They begin when cows are brought from the corral to the "wash bin" where the pusher uses sprinklers to remove any manure that may have accumulated on their udders. After that, they are taken to the milking platform where they are "pre-dipped," which entails spraying their udders with an iodine solution. The lead milker then primes their teats to check the milk and to make sure there is no discoloration—a sign of possible infection. The pusher or second milker then cleans the udders and teats with paper,

and the second milker attaches the milking machine. When milking is completed, the second milker "post-dips" the udders in a cup containing another iodine solution.

Failure to adhere to those sanitation procedures can result in mastitis by infecting the udder with manure. Vanderpoel explained that cows suffering from one or the other forms of mastitis, "get sick, they go off milk…[It] dries up the udder," resulting in less production, lower milk quality, and less income. (R.T. 225, 231.) Unless controlled and cured, it can lead to mycoplasma, a contagious form of mastitis that can spread to other members of the herd. Vanderpoel testified that, in April 2006, he lost 75 cows due to mastitis contagion—a loss which led to the termination of Foreman Vasquez who was responsible for the treatment of infected cows in the Dairy's hospital facility.

During the course of his testimony, Lopez never specifically denied Vanderpoel's claim that he had failed to follow proper sanitation procedure the day he was fired.

In January 2006, Oswaldo Mendoza was terminated by Foreman Vasquez without explanation. In May he encountered Vasquez at the Taco Bell in Tulare. He asked Vasquez—who had himself been terminated a month earlier—about his firing.

Counsel for Respondent thereupon interposed a timely hearsay objection to the admission of any out of court statements of the former supervisor. His testimony was permitted, subject to a motion to strike, and the parties were requested to brief the issue, with the understanding that the motion would be ruled upon in this decision.

Mendoza then testified that he asked Vasquez why he had been fired:

Q And what did he tell you?

A That the boss had ordered that, because, according to him, he was thinking that I had -- could have participated in the union.

. . . .

Q Did he mention any other name during that conversation?

A He mentioned several.

Q Okay. What names did he -- did he mention?

A Mine, Miguel Lopez, Hipolito Vargas.

. . . .

Q So what did he say about Miguel Lopez and the union?

A That to him, Miguel Lopez, Hipolito Vargas, and myself, that he had always had the thinking that it was us that had gone into or put in the union.

Q And who had that thinking?

A That it was the boss that was thinking it.

Q Mike Vanderpoel?

A Mike Vanderpoel, yes. (R.T. 45, 46.)

Vasquez was not called as a witness and no proof of his unavailability was offered.

## IV. FURTHER FACTUAL FINDINGS AND LEGAL CONCLUSIONS

### *A. The Alleged Denial of Access.*

The Board's access regulation, Title 8, California Code of Regulations, section 20900(e)(3)(A), permits a limited number of union organizers to enter an employer's property an hour before and after work; section 20900(e)(3)(B) then goes on to provide:

> In addition, organizers may enter the employer's property for a single period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall encompass such lunch break. If there is no established lunch break, the one-hour period shall encompass the time when employees are actually taking their lunch break, whenever that occurs during the day.

Section 20900(e)(2) allows, and even encourages, parties to reach voluntary agreements which tailor access to their unique situations:

> Voluntary Agreements on Access. This regulation establishes the terms upon which a labor organization may take access. However, it does not preclude agreements by the parties to permit access on terms other than as set forth in this part, provided that any such agreement shall permit access on equal terms to any labor organization which agrees to abide by its terms. For the purpose of facilitating voluntary resolution by the parties of problems which may arise with access, the notice of intent to take access shall specify a person or persons who may reach agreements on behalf of the union with the employer concerning access to his/her property. The parties are encouraged to reach such agreements and may request the aid of the regional director and board agents in negotiating such agreements; however, no such attempts to reach an agreement, be they among the parties themselves or with the aid of this agency, shall be deemed grounds for delay in the taking of immediate access once a labor organization has filed its notice of intent to take access.

Here, there is no evidence of any formal agreement to allow the union two hours of lunchtime access rather than the one hour specified in the regulations. Instead, the General Counsel asserts that Tule, by failing to object to the two hours of lunchtime access taken by organizers on October 11th, 12th and 13th, implicitly agreed that the Union was entitled to continue such access in the future.

For a party to enter into an implied agreement to waive a right created by statute or regulation, that party must have been aware of the right and must, by his unambiguous conduct, assent to the terms of that waiver. See *Solano Concrete Co. v Lund Cons. R.T. Co.* (1976) 64 Cal. App. 3d 572, 575; 1 Witkin, Summary of Cal. Law, (10th ed. 2005) Contracts, §121, p. 160; Civ. Code section 1621.

Here there is, first of all, some question of whether Vanderpoel was aware that, absent an agreement to the contrary, the union was entitled no more than one-hour of

lunchtime access. It is hard to believe that that the Board Agent he telephoned on the 11th did not explain the rule, but he was upset at the time and does not recall what she said, and she was not called as a witness. Likewise, it is difficult to believe that the matter was not clarified, later that day, when he spoke with his attorney, an experienced labor law practitioner. Nor is it entirely clear that he knew the organizers took 2-hour access that day and the next two days, though his foreman was certainly aware of the access taken on 12th and 13th.

Be that as it may, the evidence is clear that—at most—neither Vanderpoel nor his foreman did anything more than passively acquiesce in the additional hour of access on those occasions. General counsel asks that I read into their acquiescence not only permission to remain on the premises those days, but permission to continue to do so in the future.

I decline to so rule. When, in other contexts, the Board has been called upon to consider employer acquiescence in excess access, it has regarded each taking as a separate, discrete event where acquiescence to on one occasion is independent of—and no precedent for—excess access on another. See *Dessert Seed Company, Inc*. (1976) 2 ALRB No. 53; *Martori Brothers Distributing* (1978) 4 ALRB No. 5, IHE Dec., p. 10. This is as it should be. Here, there is no more reason for finding that allowing organizers access on one day constitutes an agreement to allow similar access the next, than for finding that allowing them to take excess access on one day constitutes an agreement confined to that day. Without solid evidence—express or implied—that the employer agreed or assented to the former, the General Counsel

fails to meet his burden of proving that Tule committed itself, irrevocably, to permitting lunchtime access of two hours a day for the duration of the campaign.

Since no such evidence was forthcoming, I recommend that the allegation be dismissed.

***B. The Discharge of Miguel Lopez***

Labor Code section 1152 of the Act grants agricultural employees the right "to self-organization, to form, join, or assist labor organizations…." Section 1153(c) makes it an unfair labor practice for an agricultural employer to discriminate against an employee "in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization."

In weighing evidence to determine whether an employer has violated § 1153(c) and. derivatively, §1153(a), our Board follows the NLRB's so-called *Wright Line* analysis. *Wright Line, A Division of Wright Line, Inc.* (1980) 251 NLRB 1083, *enf'd* (1st Cir. 1981) 662 F.2d 899, *cert, den*. (1982) 453 U.S. 989, as approved in *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393; *California Valley Land Company* (1991) 17 ALRB No. 8.

Under that analysis, the General Counsel has the initial burden of establishing, by a preponderance of the evidence, that the employee's protected union activity motivated the employer's adverse action. To do so, it must show: (1) that the employee engaged in union activity, (2) that the employer knew or suspected the employee engaged in such activity, and (3) that there was a causal relationship

between the employee's protected activity and the employer's adverse action. Only then does the burden of persuasion shift to the employer to establish, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected conduct. *Lawrence Scarrone* (1981) 7 ALRB No. 13; *NLRB v. Transportation Management Corp*., *supra at* 399-403; *Roure Bertrand Dupont, Inc.* (1984) 271 NLRB 443.

Applying the *Wright Line* analysis to the facts at issue here, there is, first of all, no question that Lopez engaged in protected union activity. He spoke with one of his coworkers about the union, during work time, three or four days before he was fired; he attended a union meeting on October 5th, the night before his termination; and he spoke in favor of the union with night-shift milkers that evening and with both inside and outside day-shift workers the next day, distributing union authorization cards on both occasions.

With respect to the second element of *Wright Line*—employer knowledge of union activity—the General Counsel initially invokes the "small plant doctrine," to the effect that knowledge will be presumed in small-scale operations.

In practice, that "doctrine" is not so much a presumption, as a recognition that the small size of an operation can legitimately be used as circumstantial evidence of employer knowledge. As such, it is one circumstance, but not the only one, to be considered. In *Mario Saikon, Inc*. (1978) 4 ALRB No. 107, p. 5, the Board refused to apply the doctrine, quoting with approval the 1st Circuit's decision in *NLRB v. Joseph Antell, Inc*., (1966) 358 F. 2d 880, 882:

> "Actually, the term small-plant doctrine is quite misleading. The smallness of the plant, or staff, may be material, but only to the extent that it may be shown to have made it likely that the employer had observed the activity in question."

Here the likelihood of employer observation due simply to Tule's small size is undercut by the extremely short period between the onset of Lopez' union activity and the alleged discrimination. He spoke briefly about the union with two co-workers 3 or 4 days before his discharge; he spent a hour the night before the discharge handing out cards and speaking with milkers at the dairy; he did the same with day shift employees the next day; then, at the end of his shift, he was fired. That is too brief a period to conclude—-simply from the size of the dairy—that the management was aware of his union activity. I therefore reject, both legally and factually, any assertion that Tule's size, in and of itself, establishes employer knowledge. If knowledge is to be found, it must be on the basis of the entire factual context.

Vanderpoel testified that he was present and observed Lopez' failure to properly post-dip cows on October 6th—the same day he was also engaged in protected activity—but denied hearing him speak of the union or seeing him pass out authorization cards. (R.T. 233-234.) Neither of the General Counsel's witnesses were aware of his presence on October 6th.

As for Vasquez, on October 6th when Lopez was passing out cards in the milking area to workers arriving for the next shift, Mendoza testified, "He [Vasquez] wasn't in the barn area where we actually milk the cows. He was to one side, maybe

he would be able to see [Lopez passing out cards]. He could have seen." (R.T. 72-73.)

There was a single video camera, without sound and with a 6-hour viewing limit, in the barn where most of the conversations occurred and where cards were distributed, but Vanderpoel asserted he had viewed the tape only once in the four months preceding Lopez's discharge and had never seen any evidence of union activity. And Lopez' testimony that he made no effort to conceal his actions from the camera was, as already mentioned, contradicted by his fellow worker, Mendoza.

Then there is Lopez' rebuffed solicitation, late in the afternoon on October 6th, of an authorization card from Vasquez' brother-in-law, who was living in the foreman's home at the time. That they dwelt together is not especially helpful since the discharge occurred only 2 hours or so after the solicitation. That leaves their relationship as the basis for inferring that Lopez' solicitation was immediately reported to Vasquez, who in turn passed it on to Vanderpoel.

Taken together, these circumstances suggest the possibility, but not the probability, of employer knowledge.

There is, however, an alleged incident which—if admitted into evidence and credited—would not only establish the requisite knowledge, but would also go to prove the third element of *Wright Line* test: the existence of a causal link between the employee's protected activity and the employer's adverse action. That incident occurred in May 2006 at a Taco Bell in Tulare when, according to Osvaldo Mendoza, Vasquez told him that Mike Vanderpoel had ordered him to discharge Miguel Lopez,

Hipolito Vargas and Mendoza because they had "gone into or put in the union." By that time Vasquez had himself been terminated.

Mendoza's testimony is double hearsay—the veracity of the evidence that Vanderpoel ordered Lopez discharged because he "put the union in" depends on, not one, but two hearsay declarants: first, Vanderpoel for what he may have said to Vasquez; second, Vasquez, who recounted Vanderpoel's hearsay declaration to Mendoza. That being so, for the evidence to be admissible, each of their out of court declarations must fall within an exception to the hearsay rule.

Had Vasquez appeared as a witness and testified to the statement made to him by Vanderpoel, that statement, though hearsay, would have been admissible under Evidence Code section 1222, as the vicarious admission of a party. It also would have been admissible under §1220 as evidence of his state of mind—animus toward Lopez for his union activity.

But what of the intermediary hearsay declarant—Vasquez? His communication of that statement to Mendoza does not qualify as an authorized admission under §1222 because, when it was made, he was no longer authorized to speak for Tule. *Markley v. Beagle* (1967) 66 Cal. 2d 951, 957; *Taylor v. Socony Mobil Oil Co.* (1966) 242 Cal. App. 2d 832, 834; 1 Witkin, Cal. Evidence (4th ed. 2000), Hearsay, §119, p. 826.

Nor is it admissible under any other hearsay exception:

(1) Evidence Code section 1224 recognizes an exception to the hearsay rule where the liability of the party to a proceeding arises, in whole or part, out of the

breech of a duty or obligation owed by the declarant. Under that provision, only if the alleged unfair labor practice were founded, in whole or part, on a breach by Vasquez of a duty or obligation that he himself owed, would his statement to Mendoza be admissible. But he had no such duty or obligation. Unlike certain civil rights statutes,[5] the Agricultural Labor Relations Act does not make supervisors or managers responsible for misconduct in which they participate. Only an employer can be held responsible, and only an employer can be a Respondent.[6] Nor is there any other statute, forum, or legal theory under which Vasquez could be prosecuted for his actions, for the Board alone has jurisdiction over the misconduct here alleged. Labor Code, section 1160.9.

(2) Evidence Code section 1230 recognizes an exception to the hearsay rule for declarations against the interest. Putting aside the question of whether Vasquez' declaration of complicity in Lopez's discharge would have been made him "an object of hatred, ridicule, or social disgrace in the community," the exception requires that he be "unavailable as a witness;" and, while Vasquez did not testify, his unavailability to testify was not established. See Evidence Code section 240.

(3) Evidence Code section 1250 recognizes a hearsay exception for the declarant's then existing state of mind, but provides that it may not be used where the statement is one of memory or belief to prove the fact remembered or believed.

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[5] *See e.g., Page v. Superior Court* (1995) 31 Cal. App. 4th 1206.

[6] It is for that reason that General Counsel's reliance on *Labis v. Stopper* (1970) 11 Cal. App. 3d 1003 is misplaced. There the contractor's liability was dependent on the liability of the painter he employed. Here Vanderpoel's responsibility for the discharge is not dependent on Vasquez' breach of duty or obligation.

Section 1250(b). Vasquez testimony that Vanderpoel told him that Lopez was to be fired for union activity is a statement of what Vasquez remembered or believed, and it is offered to prove that the fact remembered or believed. It is therefore inadmissible under section 1250.[7]

(4) In *Colarossi v. Coty US Inc*. (2002) 97 Cal. App. 4th 1142, 1150-1151, the Court found the statement of the intermediate declarant—one Murdocco—admissible under Evidence Code section 1235 as a prior inconsistent statement. That exception requires that there be an inconsistency between the hearsay declaration and the prior *testimony* of the declarant. In *Colarossi* the hearsay declarant had given contradictory testimony in his deposition. Here, there was no prior testimony from Vasquez.[8]

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[7] In its Comment to Section 1250, the Law Revision Commission explained, "Section 1250(b) does not permit a statement of memory or belief to be used to prove the fact remembered or believed. This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind--his memory or belief--concerning the past event. If the evidence of that state of mind--the statement of memory--were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred."

[8] General Counsel cites *Colarossi* as holding that the hearsay statement of an intermediary (here Vasquez) can be used to prove the state of mind of the principal (Vanderpoel). All that *Colarossi* held was the principal's statement, insofar as it reflected her feelings or beliefs would be admissible as circumstantial evidence of her own mental state. (97 Cal. App. 4th at 1150.) Here, however, we are dealing an *intermediary's* statement of the principal's feelings or beliefs.

In *J.A. Wood* (1978) 4 ALRB No. 10 evidence of the intermediary's statement was admitted for the limited purpose of proving the intermediary's state of mind—his misunderstanding of the purpose of the paper he was asked to sign—not to prove misconduct on the part of the party who gave him the paper. Here, unlike *J.A.Wood*, Vasquez' state of mind was not an issue; Vanderpoel's was. [Query, moreover, whether the intermediary's out of court statement in *J.A. Wood* was not, in fact, a

There is, however, one evidentiary rule concerning hearsay statements that does come into play here. Evidence Code section 1202 provides:

> Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct.

Mendoza testified that, on October 6th when Lopez asked "why he was being fired," Vasquez stated, "*that he did not know why*, but that he was firing him." (R.T. 41; emphasis supplied.) That hearsay statement to Mendoza was "received in evidence" without objection. Later, in his Taco Bell statement to Mendoza, Vasquez stated that he *did know* the reason Lopez was fired. Under §1202, that inconsistent statement is admissible, not to establish the truth of what he said, but to discredit the statements he made which were received in evidence. For that limited purpose, the Taco Bell testimony is therefore admitted.

Vasquez' failure to give a straight answer to either Lopez or Mendoza when he was asked why Lopez was being fired is in itself suspicious, and that suspicion is enhanced by the above inconsistency in his statements, justifying the inference that he is not to be believed when he claimed he did know the reason for the firing and was,

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hearsay statement, admissible under Evidence Code section 1250, offered to prove the declarant's state of mind; furthermore, *J.A. Wood* was a representation proceeding where the more permissive hearsay standard for California administrative hearings has traditionally applied. See Gov. Code section 11513(d).]

General Counsel also cites the NLRB standard for admitting hearsay—is it probative and corroborated. Our Act is not so permissive. It requires that unfair labor practice proceedings "so far as practicable, be conducted in accordance with the Evidence Code." Labor Code section 1160.2.

in fact, deliberately concealing what he knew from the two workers. Had Vanderpoel told him to fire Lopez for a sanitation violation, Vasquez would have had no reason whatsoever to conceal that fact; if, however, the reason was union activity, he had every reason to conceal what he knew. While it is conceivable that there was some other secret or reprehensible explanation for his refusal to tell Lopez why he was being terminated, the contextual circumstances suggest otherwise.

Finally, there is the element of timing. Lopez was terminated at the end of the shift on October 6th, immediately after he had spent the day talking up the union and distributing authorization cards.

Those two factors, taken together with the evidence, discussed earlier, indicating the possibility of employer knowledge (*ante*, pp. 17-18), constitute a body of circumstantial evidence sufficient to establish not only knowledge of Lopez' protected activity but the requisite causal connection between that activity and his termination. General counsel has therefore met its obligation, under *Wright Line*, to "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *California Valley Land Company* (1991) 17 ALRB No. 8, p. 6. That being so, the burden shifts of the Respondent to prove that it would have taken the same action even in the absence of the protected union activity. *Lawrence Scarrone, supra*; *NLRB v. Transportation Management Corp., supra*; *Roure Bertrand Dupont, Inc., supra*.

To meet that burden, Respondent offered Vanderpoel's testimony that on the morning of October 6th he personally observed Lopez ignoring proper sanitation

procedure by "not post-dipping cows, not wiping cows clean and sanitary like they should be." (R.T. 232.) That testimony is slightly marred by his confusing further testimony that Lopez "Wasn't wiping cows, wasn't *pre-dipping* - - you know wipe two tits (sic) instead of four" (R.T. 233; emphasis supplied.)

More significantly, there is no evidence to corroborate Vanderpoel's account. Had Vasquez responded, as one would have expected, to Lopez' and Mendoza's questions about the reason for the discharge and explained that it was due to a serious violation of company rules, there would have been some corroboration. But he did not.

Corroboration, to some extent, could also have been supplied by independent evidence that Vanderpoel was actually in the milk barn on October 6th. But such evidence was not forthcoming. Neither Mendoza nor Lopez saw him there.[9]

Vanderpoel did present detailed and uncontradicted testimony concerning the serious health and economic consequences that can result when an employee fails to follow prescribed sanitation procedures during milking—mastitis, with its consequent impact on production, milk quality and income. (*Ante*, pp. 10-11.) He further explained that the risk is not confined to the cow improperly dipped but extends to the entire herd because of the risk that the infection will spread. (*Ante*, p. 11.)

This credible testimony, however, raises some very perplexing questions: Why

[9] Vanderpoel himself conceded that, what with his other duties, he has little time to spend in the milking barn: "When I'm in the dairy, am I in the milk barn for two, three hours a day? Absolutely not." (R.T. 254.)

didn't Vanderpoel immediately intervene to protect the wellbeing of his cows—and potentially his herd—when he saw the danger to which Lopez had subjected them? Why didn't he rush over and see to it that they were properly sanitized? Why did he do no more than instruct his foreman to terminate the offender? The failure of Respondent to answer those questions casts serious doubt on the credibility of Vanderpeol's claim to have witnessed any such dangerous conduct.

To be sure, a serious violation of established work rules would—if it actually occurred—justifiy the imposition of serious discipline. If, in fact, Lopez, failed to properly dip and wipe one or more cows, then serious discipline, up to and including discharge, was warranted, and there would be no "disproportion" between his offense and his treatment. That would be true even if Tule had a policy of "progressive discipline" because such policies uniformly recognize that employees can be discharged for serious misconduct without going through intermediate warnings, suspensions, etc. Here, Employer had no such policy (R.T. 233); employees judged incompetent were terminated without prior written warning. (R.T. 93-95, 233.) Lopez's immediate firing for a sanitation violation would not, therefore, have constituted a deviation from established practice.

Then, too, Vanderpoel's account of the discharge as occurring on the same day as the sanitation violation would, if accepted, also negate any inference that the timing of the discharge, on the day he engaged in union activity, made it suspect.

The ultimate issue, then, is the believability of Vanderpoel's uncorroborated testimony that he saw Lopez fail to properly sanitize cows on the morning of October

6th.

While it is true that nowhere in the record did Lopez state, in so many words, that he had correctly dipped and wiped the cows, he did testify that, after receiving Vasquez' first, unsatisfactory explanation, "I asked him as to why would he fire me, *if we were doing our job good?*" (T.R. 89; emphasis supplied.) Implicit in his question to his foreman is his belief and assertion that he had done nothing wrong at work. Since he had not done anything wrong, he wanted to the foreman to tell him why he was being terminated.

That implicit assertion of innocence was corroborated when Mendoza, who had worked alongside him throughout the day, asked Vasquez "why was he being fired, *because he was a good worker*." (T.R. 41; emphasis supplied.) A fair reading of that statement would encompass not only Lopez' good past work record, but would extend through the day in question.

Yet in neither case did Vasquez respond to the employees' reasonable request. Instead, he obfuscated—an obfuscation which, as explained above, gives rise to a legitimate inference that Lopez' union activity was the motivating factor in the discharge. (*Ante*, pp. 22-23.)

Taking Vanderpoel's uncorroborated testimony, on the one hand, and Lopez' credible and corroborated testimony, on the other, and further taking into account the inferences that are properly to be drawn from Vasquez' failure to give a straight answer to Lopez and Mendoza's questions, and the lack of any coherent explanation for Vanderpoel's failure to immediately act to protect his cows from the danger to

which Lopez had purportedly subjected them, I conclude that Respondent has failed to meet its burden, under *Wright Line*, of proving by a preponderance of the evidence that Lopez was terminated for a legitimate business reason.

## RECOMMENDED ORDER

I therefore recommend to the Board that, pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Complaint in Case No. 05-CE-51-VI be dismissed, and that, in Case No. 05-CE-49-VI, Respondents Tule River Dairy and P&M Vanderpoel Dairy, as joint employers, and their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise retaliating against any agricultural employee with regard to hire or tenure of employment because the employee has engaged in union or other concerted activity protected by section 1152 of the Agricutural Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

2. Take the following affirmative actions that are deemed necessary to effectuate the policies of the Act:

(a) Rescind the discharge of Miguel Lopez and offer him immediate reinstatement to his former position of employment or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other

rights of employment.

(b) Make Miguel Lopez whole for all wages or other economic losses he suffered as a result of Respondent's unlawful discharge on October 6, 2005, to be determined in accordance with established Board precedent. The award shall reflect any wage increase, increase in hours or bonus given by Respondent since the unlawful discharge. The award shall also include interest to be determined in the manner set forth in *E.W. Merritt Farms* (1988) 14 ALRB No. 5.

(c) In order to facilitate the determination of lost wages and other economic losses, if any, for the period beginning October 6, 2005, preserve and, upon request, make available to the Board and its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary for a determination, by the Regional Director, of the economic losses due under this Order. Upon request of the Regional Director, payroll records shall be provided in electronic form if they are customarily maintained in that form.

(d) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(e) Post copies of the attached Notice, in appropriate languages, for 60 days in conspicuous places on its premises, the period(s) and place(s) to be determined by the Regional Director and exercise due care to replace any Notice which has been altered, defaced, covered, or removed. Pursuant to authority granted

under Labor Code section 1511(a), give agents of the Board access to its premises to confirm the posting of the Notices.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled agricultural employees of Respondent on company time, at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after this Order becomes final or when directed by the Regional Director, to all agricultural employees employed by Respondent at any time during the period from October 6, 2005 to October 6, 2006.

(h) Provide a copy of the attached Notice, in all appropriate languages, to each agricultural employee hired to work for Respondent during the twelve-month period following the date of this Order.

(i) Notify the Regional Director in writing, within 30 days after the date of this Order becomes final, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional

Direct periodically thereafter in writing of further actins taken to comply with the terms of this Order.

Dated: March 16, 2009

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JAMES WOLPMAN
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Visalia Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged Tule River Dairy and P&M Vanderpoel Dairy violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that it did violate the law by discharging Miguel Lopez on October 6, 2005.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT discharge or discriminate against any agricultural employee because he or she participated in union activities or because he or she has exercised any of the above rights.

WE WILL offer Miguel Lopez his job back and will reimburse him with interest for any economic losses he has suffered because we improperly terminated him on October 6, 2005.

DATED:

TULE RIVER DAIRY AND P&M VANDERPOEL DAIRY

By _____
Representative Title

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board.